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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JANETTE NOLASCO et al., Plaintiffs and Appellants, v. SCANTIBODIES LABORATORY, INC., Defendant and Respondent.	D072945 (Super. Ct. No. 37-2014-0004716)

APPEAL from an order of the Superior Court of San Diego County, Gregory W. Pollack, Judge. Affirmed.

Letizia Law Firm and Clarice J. Letizia for Plaintiffs and Appellants.

Niddrie Addams Fuller Singh and David A. Niddrie for Defendant and Respondent.

Plaintiffs Janette Nolasco and Brenda Taylor (Plaintiffs) sued defendant Scantibodies Laboratory, Inc. (Scantibodies), for retaliation under California Labor Code

section 1102.5.[1] Their complaint included a claim under section 2699 et seq., the Private Attorney General Act of 2004 (PAGA). The section 1102.5 claims were tried to a jury, and the jury found Scantibodies liable for retaliation. Following trial, Plaintiffs sought attorney's fees and costs pursuant to section 2699, subdivision (g) of PAGA. The trial court determined Plaintiffs did not prevail on their PAGA cause of action, and denied their motion.

In a separate appeal, Scantibodies appealed from the judgment, and we affirmed. (*Nolasco v. Scantibodies Laboratory, Inc.* (Feb. 26, 2019, D071923) [nonpub. opn.].)[2] Here, Plaintiffs appeal from the denial of PAGA fees and costs. We conclude the trial court did not err in denying fees and costs under PAGA, and we therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2014, Plaintiffs, along with Shannon Coates and Grace Rivera, sued Scantibodies for retaliation under Labor Code section 1102.5 and related claims. The complaint included a cause of action for "Violation of provisions listed in Labor Code [section] 2699.5 for Penalties, Attorneys' Fees And Costs of Litigation Pursuant To Labor Code [section] 2699." It stated, in part, that Plaintiffs "complied with the procedural

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1 Further statutory references are to the Labor Code unless otherwise noted.

2 Scantibodies also appealed from an order granting Code of Civil Procedure section 1032 costs to Plaintiffs, and we affirmed. (*Nolasco v. Scantibodies Laboratory, Inc.*, (Feb. 26, 2019, D073157) [nonpub. opn.].) Plaintiffs contend the record in D071923 was incorporated by reference, and Scantibodies represents the records from both appeals have been incorporated. We take judicial notice of both records. (Evid. Code, §§ 452, 459.)

prerequisites to filing suit set forth in Labor Code [section] 2699.3[, subdivision] (a)."[3] (Italics omitted.) Scantibodies's answer contained affirmative defenses for failure to exhaust administrative remedies and on the grounds that an award under section 2699.3 would be "unjust, arbitrary, oppressive and/or confiscatory."

Scantibodies moved for summary judgment and/or adjudication, including on the PAGA claim, contending it failed in the absence of other Labor Code violations. Scantibodies did not contend Plaintiffs failed to comply with section 2699.3. The trial court partially granted the motion, including dismissing all claims as to Coates and Rivera, finding the PAGA claim failed as to Labor Code claims not at issue here, and denying summary adjudication "[a]s to the PAGA penalties for Taylor's and Nolasco's [section] 1102.5[, subdivisions] (b) and (c)" claims.

The case proceeded to a jury trial on the section 1102.5 claims. PAGA was mentioned only once. On direct examination, Taylor testified that Scantibodies took certain actions after it "received notice that [she] was filing this lawsuit," confirming she meant the letter Plaintiffs' counsel sent the Labor Board. Plaintiffs' counsel asked to publish Exhibit No. 55, which defense counsel described as "basically, a PAGA letter." Defense counsel stated, "I don't see the relevance of having this document" and "How could [Taylor] authenticate that? It's not from her." Plaintiffs' counsel contended the letter was relevant "because no investigation into [Taylor's] complaints was ever

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[3] As discussed *post*, section 2699.3 requires exhaustion of administrative remedies prior to commencing a civil action.

conducted until they got this letter." The court ruled "the letter . . . is hearsay." Plaintiffs' counsel stated, "All right." The court indicated Taylor could refresh her recollection with the letter, but confirmed counsel could not "get this letter into evidence," and Plaintiffs' counsel stated, "Okay." Taylor then testified Exhibit No. 55 was dated October 18, 2013. The verdict form did not address PAGA.

The jury found Plaintiffs established their retaliation claims, and following posttrial motions, the trial court entered judgment in December 2016. The judgment provided "plaintiffs may recover . . . attorney's fees and such other costs not including those awarded under [Code of Civil Procedure section] 1032, if any, in the amount of _____, and civil penalties, if any, in the amount of ____ pursuant to Labor Code [section] 1102.5[, subdivision] (f), [section] 2699 and [section] 2699.5." (Italics omitted.)

In March 2017, Plaintiffs' counsel filed an "Ex Parte Application To Extend Time For Filing Attorney[']s Fees Motion Pursuant To [Rule] 3.1702(d)." PAGA penalties were not addressed in the application or at the hearing. The court granted the application.

In April 2017, Plaintiffs filed a "Motion for Attorney[']s Fees and Costs" arguing they were entitled to fees and costs under Labor Code section 2699, subdivision (g). They noted section 1102.5 provides for a civil penalty, but they did not request penalties. In her declaration supporting the motion, Plaintiffs' counsel stated: "I filed the Complaints with the California Labor Board, Labor and Workforce Development Agency, on behalf of all four plaintiffs and served them on the defendant." (Italics omitted.)

Scantibodies opposed the motion, arguing Plaintiffs did not prevail on their PAGA claim. Scantibodies contended, among other things, that there was no evidence of compliance with section 2699.3. Scantibodies also contended Plaintiffs did not seek jury or court findings on PAGA, and "abandoned and/or waived" the PAGA claim.

On reply, Plaintiffs argued they "did not try a PAGA claim, because those claims were dismissed on summary adjudication." They further argued they were "seek[ing] attorney[']s fees and costs, pursuant to . . . Labor Code [section] 2699, for their success in their Labor Code [section] 1102.5 claim." (Italics omitted.) In a footnote, they stated they were "not seeking penalties because of [the trial court]'s comment that it would be unlikely to award penalties because the punitive damages awards were already awarded by the jury." They did not identify where the court made this purported comment.

Plaintiffs also argued the case "was brought in a representative capacity on behalf of four plaintiffs," and that they identified other aggrieved employees whose testimony "the court would not allow, over plaintiffs' objections." They further argued they produced evidence at trial regarding the prelitigation notice issue and it was undisputed they complied with this exhaustion requirement under section 2699.3. They contended "[t]he pre-suit exhaustion requirement letters are on the exhibit list as Exhibits 55 and 79" and were "discussed . . . during the trial." They did not state Exhibit Nos. 55 and 79 were attached to their brief (nor does it appear they were). They also described trial testimony from Taylor, Nolasco, and Anna Marie C., director of human resources, purportedly reflecting receipt of the notices, without citation.

The trial court heard the motion in July 2017. The court stated "[t]here is this issue about whether you have to bring a PAGA claim as a representative action or not," but determined it did not "have to decide this case on that basis." The court explained:

> "Even though you prevailed on [section] 1102.5, and that was one of the predicate bas[es] for the PAGA cause of action, you abandoned that. The PAGA case was never tried. There [were] no jury instructions on it. There was no argument. There was no determination. [¶] And I do believe that if you are going to get attorney fees under [section] 2699, you have to show that you prevailed on the PAGA claim. I mean, that attorney fees provision is right there in the PAGA statute. Look at the sentence before and the sentence after. I mean, it's just obviously talking about the prevailing party on the PAGA claim. . . ."

Plaintiffs' counsel argued they had punitive damages, instead of penalties, and you cannot elect both. The court responded: "You didn't plead it as an alternative [to] punitive damages. That's kind of an after-the-fact make-up, quite frankly. I think you're trying to rationalize something that really was not rationalized at the time."[4]

Plaintiffs' counsel asked what would have to be proven under PAGA, and the trial court stated, "There should have been a question on the verdict form regarding penalties." The court also stated it was "not so sure that you don't have to prove and establish that you [sent] the prerequisite notices." Counsel argued Anna Marie's testimony was proof, but agreed with the court that the jury was not asked to address the issue.

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4 The court surmised there were "two erroneous premises" that led to abandonment: (1) Plaintiffs' belief that if they prevailed under section 1102.5, subdivision (b), they would automatically get fees; and (2) Plaintiffs' belief PAGA had been dismissed on summary adjudication. Plaintiffs' counsel stated she "didn't believe . . . the entire PAGA claim was dismissed on summary judgment," and that it was the "two other Labor Code violations that were dismissed."

The trial court's minute order summarized the principles governing attorney fees pursuant to PAGA, and stated "the threshold issue before this court is whether plaintiffs prevailed on their PAGA cause of action, not whether they prevailed in this case generally." (Italics omitted.)

The court explained that "the majority rule and weight of authority is that a PAGA claim can only be brought in a representative capacity," and Plaintiffs "neither in their pleadings nor evidence adduced at trial, purported to make a representative claim under PAGA." (Italics omitted.) The court noted Plaintiffs contended they brought a representative action "on behalf of the aggrieved employees, specifically identified by name in the complaint," but that "[w]hether this is a distinction without a difference is an issue that does not need to be determined by this court because even if viably pled, the PAGA claim was abandoned at trial." (Italics omitted.) The court noted neither the verdict nor judgment revealed Plaintiffs to be prevailing parties on PAGA; Plaintiffs did not seek PAGA penalties at the time of trial; and Plaintiffs did not proffer jury instructions or a verdict form addressing PAGA.

The court also explained that while Plaintiffs' complaint alleged compliance with section 2699.3, they "failed to prove such compliance at the time of trial." (Italics omitted.) The court found "[t]his failure to prove, as opposed to simply allege, compliance with the requirements of serving pre-litigation PAGA notices on both the LWDA [Labor and Workforce Development Agency] and employer is consistent with plaintiffs' having abandoned their PAGA claim at the time of trial." (Italics omitted.)

Based on its conclusion that Plaintiffs were not prevailing parties on their PAGA claim, the court denied Plaintiffs' motion for fees.

Plaintiffs timely appealed. In their appellants' appendix, they included Exhibit Nos. 55 and 79 (i.e., Taylor's and Nolasco's LWDA notices). In their briefing, they state Taylor's notice "was marked as Trial Exhibit 55" and discuss the notices collectively, but do not specifically address Exhibit No. 79. They cite Taylor's testimony, including that Exhibit No. 55 was dated October 18, 2013, and the notice received by Scantibodies was the "letter that [her counsel] sent to the Labor Board." They also cite testimony from Anna Marie, including that she "received this notice that [Taylor] was suing us" and agreed that "[a]t the end of October, Scantibodies received a copy of the notice that [Taylor]'s attorney sent to the California Labor Board alleging that Scantibodies had retaliated against its current and former employees that refused to violate FDA regulation[s] . . . ."

DISCUSSION

I

Request for Judicial Notice

Plaintiffs request judicial notice of the notices purportedly sent to the LWDA and Scantibodies (which they already included in their appellants' appendix), the summary judgment order, and an excerpt of the register of actions. We have already taken judicial notice of the records in the related appeals, which encompass the summary judgment order and register of actions. Scantibodies opposes judicial notice for the notices, and also challenges their inclusion in the appendix.[5]

The request for judicial notice is arguably moot, given the documents are in the appendix, and we thus focus our analysis on the challenge to the appendix. There is no issue with Exhibit No. 55 being in the appendix, as it was addressed at trial and excluded from evidence. (See Cal. Rules of Court, rule 8.122(b)(3)(B) [clerk's transcript must contain "[a]ny exhibit admitted in evidence, refused, or lodged]; rule 8.124(b)(1)(B) [appendix must contain items from rule 8.122(b)(3) "necessary for proper consideration of the issues"].) However, notwithstanding the inclusion of Exhibit No. 79 on the joint trial exhibit list, Plaintiffs have not identified anything in the record to indicate this exhibit was introduced at trial, lodged with the trial court, or otherwise before the court. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768 (*Del Real*) ["[I]t is

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5 Scantibodies previously moved to strike the notices from the appendix, and we indicated they could "raise arguments concerning the scope of appellants' appeal and references to materials outside the record" in their merits brief.

counsel's duty to point out portions of the record . . . . [A]ny point raised that lacks citation may, in this court's discretion, be deemed waived."].) We will not consider Exhibit No. 79.[6]

II

Applicable Law

A. *PAGA*

PAGA "authorizes a representative action only for the purpose of seeking statutory penalties for Labor Code violations (. . . § 2699, subds. (a), (g)), and an action to recover civil penalties 'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.' " (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 381; *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501 [PAGA "relief is in large part 'for the benefit of the general public rather than the party bringing the action.' "].)

PAGA is codified in section 2699. Under section 2699, subdivision (a) "any provision of [the Labor C]ode that provides for a civil penalty to be assessed and collected by the [LWDA] . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself

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6 Scantibodies indicates both exhibits were excluded, but provides no record citations either; regardless, neither was in evidence. We also note the successful requests for judicial notice cited by Plaintiffs are distinguishable. Only two involved prefiling notices, both were requests by defendants, and one also encompassed agency communications. (See *Ayala v. Frito Lay, Inc.* (E.D.Cal. 2017) 263 F.Supp.3d 891, 901-902; *Adetuyi v. City & County of San Francisco* (N.D.Cal. 2014) 63 F.Supp.3d 1073, 1080-1081.)

or herself and other current or former employees pursuant to the procedures specified in Section 2699.3." We address section 2699.3 in more detail, *post*.

Section 2699, subdivision (g)(1) provides:

> "[A]n aggrieved employee may recover the civil penalty described in subdivision (f) in a civil action pursuant to the procedures specified in Section 2699.3 filed on behalf of himself or herself and other current or former employees against whom one or more of the alleged violations was committed. Any employee who prevails in any action shall be entitled to an award of reasonable attorney's fees and costs . . . . Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law . . . ."

(*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 578 ["If an employee prevails in a PAGA action, he or she is entitled to an award of reasonable attorney fees and costs."]; *Harrington v. Payroll Entertainment Services, Inc*. (2008) 160 Cal.App.4th 589, 594 [describing § 2699, subd. (g) as providing that "an employee whose action results in the payment of civil penalties 'shall be entitled to an award of reasonable attorney's fees and costs' "].)

B. *Standard of Review*

The issue in this appeal is whether the trial court erred in determining Plaintiffs were not prevailing parties on their PAGA claim and thus denying their motion for fees and costs under section 2699, subdivision (g).

Plaintiffs argue for de novo review based on the scope of the appeal (which they contend is limited to whether the court improperly required penalties and the issue of exhaustion to be submitted to the jury) and the presence of questions of statutory interpretation. Scantibodies argues the abuse of discretion standard of review applies.

We agree with Scantibodies. "On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. . . . [D]e novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law." (*Carver v. Chevron U.S.A., Inc*. (2002) 97 Cal.App.4th 132, 142.) Our review does not turn on a question of law; the court acknowledged Plaintiffs *could be* prevailing parties under section 2699, subdivision (g), but found they had not established they *were in fact* prevailing parties.

III

Analysis

A. *The Trial Court Did Not Err in Denying Fees and Costs Under PAGA*

1. *Scope of This Appeal*

As an initial matter, we clarify the issues that are not before us. Plaintiffs contend there was only one cause of action, under section 1102.5, with PAGA "providing additional *remedies* . . . ." They argue the trial court erroneously "classified PAGA as a 'separate cause of action,' " thus "imposing on [them] the . . . additional requirement to have the jury determine PAGA penalties, and the jury to decide if the pre-suit exhaustion requirements were met." (Italics omitted.) In support of these contentions, they maintain there is only one primary right at issue—to be free from retaliation in the workplace.

Thus, Plaintiffs appear to focus on whether the trial court erred by purportedly requiring them to submit penalties and compliance with section 2669.3 to the jury. However, these issues are not before us, and we need not address Plaintiffs' related

primary rights arguments. Although the trial court commented on Plaintiffs' failure to submit penalties and exhaustion to the jury, it did not hold penalties were an element of a PAGA claim to be decided by the jury, or that the jury had to decide whether PAGA requirements were satisfied. It held Plaintiffs were not prevailing parties under PAGA. (*Wal-Mart Real Estate Business Trust v. City Council of San Marcos* (2005) 132 Cal.App.4th 614, 625 (*Wal-Mart*) [" '[W]e review the trial court's order, not its reasoning, and affirm an order if it is correct on any theory apparent from the record.' "].)

We address one further issue here. Although Plaintiffs focus on the purported jury-related rulings, they also contend fees are due to "[a]ny employee who prevails in any action" (quoting part of § 2699, subd. (g)(1)), and thus suggest they could obtain PAGA fees generally, without recovering under PAGA specifically. To the extent they are taking this position, they provide no substantive statutory analysis of section 2699, subdivision (g) or relevant authority in support, and thus forfeit the issue. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 (*Badie*) ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."]; *Cortez v. Abich* (2011) 51 Cal.4th 285, 292 ["[W]e look first to the words of the statute, ' "giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose." ' [L]anguage that permits more than one reasonable interpretation allows us to consider 'other aids, such as the statute's purpose, legislative history, and public policy.' "], citations omitted; cf. *Monaghan v. Telecom Italia Sparkle of North America, Inc*. (9th Cir. 2016) 647 Fed.Appx. 763, 771

(*Monaghan*) ["read in light of the immediately preceding sentence, as well as the PAGA as a whole, the reference to 'any action' upon which the district court relied is most reasonably construed as referring to 'any [PAGA] action'], italics omitted.)

2. *The Trial Court Did Not Abuse Its Discretion*

Addressing the issue before us, we conclude the court did not abuse its discretion in determining Plaintiffs did not prevail on their PAGA claim and were not entitled to PAGA fees and costs.

First, the trial court determined Plaintiffs abandoned their PAGA claim, noting in part that they did not seek PAGA penalties at trial; they did not proffer jury instructions or a proposed verdict form with PAGA questions; and their failure to prove compliance with section 2699.3 was "consistent with . . . having abandoned their PAGA claim . . . ." Viewed in context, we understand the trial court's concern to be that while Plaintiffs pled a PAGA cause of action, they failed to take steps to establish recovery under PAGA. That concern is supported by the record. Plaintiffs took no steps to pursue PAGA penalties from either the jury *or* the court, and did not seek either findings or rulings that their action was representative in nature or that they satisfied section 2699.3. Plaintiffs dispute they abandoned their claim by not submitting PAGA issues to the jury, but they do not establish they otherwise preserved them.[7]

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7 We recognize civil penalties typically are an issue for the court, and PAGA provides the court is authorized to impose them. (See *Mendoza v. Ruesga* (2008) 169 Cal.App.4th 270, 285, fn. 9 [civil penalties under Bus. & Prof. Code, § 22440 et seq. are "matter for the trial court"]; § 2699, subd. (e)(1) [where LWDA has discretion to

Second, the trial court also found that "plaintiffs failed to *prove* such compliance [with section 2699.3] at the time of trial" and this "failure to *prove*, as opposed to simply allege" was consistent with abandonment. The parties differ on what this finding means. Scantibodies argues the trial court found Plaintiffs did not prove compliance with section 2699.3. Plaintiffs maintain their compliance with section 2699.3 is undisputed, and the court simply found no compliance because Plaintiffs did not submit the matter to the jury. The court's order does not explicitly state compliance with section 2699.3 should have been submitted to the jury, or that this was the basis for the court's ruling. Regardless, the record supports the trial court's conclusion that Plaintiffs failed to prove compliance with section 2699.3. (*Wal-Mart, supra*, 132 Cal.App.4th at p. 622.)

At the relevant time, section 2699.3 provided that "[t]he aggrieved employee or representative shall give written notice by certified mail to the [LWDA] and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation." (Stats. 2004, ch. 221, § 4; § 2699.3,

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assess civil penalty, court "is authorized to exercise the same discretion"].) But Plaintiffs did not seek civil penalties from the court, either. They argue it was "anticipated" the court would disallow them, stating that "[d]uring an ex parte hearing regarding defendants' refusal to approve the judgment," the court advised "it was not likely to award any penalty because of the significant punitive damages award." (Italics omitted.) They provide no record support for this assertion; their cite is to their reply brief on the fees motion, which did not identify the hearing where the court made this purported statement. (*Del Real, supra*, 95 Cal.App.4th at p. 768.) Plaintiffs also argue that after the court found they abandoned PAGA, they "were not able to have the Court determine the penalties" (and elsewhere contend the court lost jurisdiction after this appeal was filed). Notwithstanding these claims, there remains no dispute Plaintiffs never sought penalties under their PAGA claim.

subd. (a)(1)(A).) Section 2699.3 further stated: "The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 33 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699." (Stats. 2004, ch. 221, § 4; § 2699.3, subd. (a)(2)(A).)[8] (See *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 382 ["prelawsuit notice requirement is 'an essential element of the cause of action' "].)

In the trial court, Plaintiffs argued they provided evidence of compliance with section 2699.3 and that it was undisputed they complied. They cited Exhibit Nos. 55 and 79, but without providing them or addressing Exhibit No. 55's exclusion. They described trial testimony that purportedly reflected Scantibodies's receipt of the notices, but without citations (indicating in their reply brief here that the record had not been transcribed). And their counsel stated in her declaration that she filed the notices with the LWDA and Scantibodies, but did not state when she sent them, provide proofs of service, or address the LWDA's responses, if any. This record left the issue far from undisputed.

Even assuming the trial testimony Plaintiffs cite on appeal would have been sufficient to establish timely notice, they also had to establish the notices addressed the

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8 Other provisions apply if the agency intends to investigate. (§ 2699.3, subd. (a)(2)(B).)

specific Labor Code violation at issue and "facts and theories" in support. (§ 2699.3, subd. (a)(1)(A).) But the notices did not come into evidence. Only Exhibit No. 55 was identified at trial, it was excluded on hearsay grounds, and Plaintiffs' counsel acquiesced to its exclusion. Plaintiffs now dispute Exhibit No. 55 is hearsay, but we will not consider a challenge to an evidentiary ruling for the first time on appeal. (See *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282 [appellants "fail to point to any place in the record where they successfully preserved their evidentiary claims of error"].) As discussed *ante*, it is not clear Exhibit No. 79 was ever before the trial court at all. And the cited trial testimony reflects, at most, that the notice involved retaliation in connection with FDA regulations. (See, e.g., *Alcantar v. Hobart Serv*. (9th Cir. 2015) 800 F.3d 1047, 1056 [affirming summary judgment for defendants when written notice to employer "did not contain sufficient facts to comply with [PAGA]'s notice requirements"].)

Plaintiffs' other arguments regarding compliance with section 2699.3 lack merit. They contended in their opening brief that the case would not have survived summary judgment or summary adjudication "had the . . . requirements of [section] 2699.3 not been met," and elsewhere stated Scantibodies did not raise the issue because compliance was undisputed. They provide no reasoned argument or authority to explain how denial of summary adjudication or failure to seek it establishes compliance (undisputed or otherwise). (*Badie*, *supra*, 67 Cal.App.4th at pp. 784-785.) Scantibodies argued in response that survival on summary judgment is not proof of compliance. On reply, Plaintiffs denied they argued denial of summary adjudication on the PAGA claim was

"proof of its merit," and contended for the first time that dismissal of "only part of the PAGA 'cause of action' is evidence that it is not really a separate 'cause of action.' " (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 (*Stroh*) ["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument."].) Regardless of which argument Plaintiffs are pursuing, they have waived the issue.

Plaintiffs also rely on *Kim v. Konad* (2014) 226 Cal.App.4th 1336, 1346 (*Kim*), a Fair Employment and Housing Act (FEHA) case, to suggest Scantibodies improperly delayed raising the PAGA compliance issue. In *Kim*, defendants moved to vacate a judgment for plaintiffs on jurisdictional grounds, contending that plaintiffs failed to exhaust administrative remedies. (*Id*. at p. 1343.) The court held exhaustion was not jurisdictional. (*Id*. at p. 1347.) It also determined defendants forfeited their right to obtain a dismissal, by not requesting it "[p]rior to submission of the case for decision." (*Id*. at p. 1348.) Jurisdiction is not at issue here and we find the reasoning on forfeiture unclear, given *Kim* elsewhere noted the plaintiff has the burden of proving exhaustion. (*Id*. at p. 1345.) Regardless, *Kim* is distinguishable. There, the plaintiff tried a FEHA claim, and defendants later tried to raise a FEHA exhaustion argument. Here, Plaintiffs tried a section 1102.5 claim, then later sought *PAGA* fees and costs—at which point

Scantibodies raised PAGA-related objections.[9] Further, unlike Scantibodies, the *Kim* defendants did not challenge the admissibility of evidence reflecting exhaustion. (*Kim*, at p. 1346.)

Plaintiffs also contend *Kim* establishes exhaustion is an issue for the court to decide. *Kim* noted "[c]ommon sense dictates that most failure-to-exhaust issues do not involve triable questions of fact and will therefore be resolved by dispositive motions prior to trial." (*Kim, supra,* 226 Cal.App.4th at p. 1346.) That principle is not in dispute. But *Kim* did not suggest, much less hold, that it would be appropriate for the court to determine such issues in the absence of adequate factual support, as was the case here.[10]

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9 For similar reasons, the other cases cited by Plaintiffs are also distinguishable. (See *Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 133, 136 [defendant did not raise exhaustion on section 1102.5 claim until appeal from judgment on that claim; defendant waived issue by "waiting to raise exhaustion until after a full trial on the merits"]; *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 222-223 [wrongful termination case; accord]; *Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 896, 899-900 [FEHA case; defendant waived issue regarding notice raised in appellate reply brief].)

10 The trial court also questioned whether Plaintiffs brought a representative action, but did not need to resolve the issue. We share those doubts. Plaintiffs' action concerned their own protected conduct and retaliation. (Cf. *Reyes v. Macy's, Inc*. (2011) 202 Cal.App.4th 1119, 1123 [plaintiff "asserting a PAGA claim . . . must bring it as a representative action and include ' "other current or former employees." ' "]; *Monaghan, supra,* 647 Fed.Appx. at p. 771 [error to award fees under § 2699, subd. (g), on claims brought in individual capacity].) On reply, Plaintiffs claim they offered evidence about five other employees. We need not reach this point (*Stroh, supra,* 10 Cal.App.4th at p. 1453), but note Plaintiffs indicate the court would not permit certain employees to testify about the reasons for their terminations or resignations (and that one was "not technically retaliated against").

B. *Plaintiffs' Request for a Hearing on Penalties*

Plaintiffs also argue the case should be remanded to "schedule a . . . hearing to determine whether and how much of a penalty should be assessed against the defendant for its violations of [section] 1102.5." We already determined the trial court did not err in concluding Plaintiffs did not prevail under PAGA. Further, Plaintiffs never requested a hearing on penalties from the trial court, and we will not consider the request for the first time on appeal.[11]

DISPOSITION

The order is affirmed. Scantibodies shall recover its costs on appeal.

GUERRERO, J.

WE CONCUR:

AARON, Acting P. J.

DATO, J.

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11 Scantibodies presents other arguments to support the trial court's denial of fees, contending Plaintiffs waived their right to fees by failing to apportion their time; invited the alleged error, if any; and that their PAGA fees motion was untimely. Based on our foregoing conclusions, we need not address these arguments.